

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 360

THE UNITED STATES OF AMERICA, PETITIONER

vs.

**CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS
ADMINISTRATOR OF THE ESTATE OF ROBERT C.
TOWERY, DECEASED**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

**PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1938
CERTIORARI GRANTED OCTOBER 24, 1938**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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vs.

CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS
ADMINISTRATOR OF THE ESTATE OF ROBERT G.
TOWERY, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 [Caption omitted.]

3 In United States District Court for the Northern District of
Illinois, Eastern Division

No. 45443

CHARLES F. TOWERY IN HIS OWN RIGHT AND AS ADMINISTRATOR OF
THE ESTATE OF ROBERT C. TOWERY, DECEASED, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed June 29, 1936

*To the District Court of the United States for the Northern District
of Illinois, Eastern Division:*

The plaintiff complains of the above named defendant and for
cause of action alleges:

1. That the plaintiff is a citizen of the United States of America
and a resident of the said Northern District of Illinois, Eastern
Division, and is now a resident of Chicago, Illinois; that Robert C.
Towery enlisted for military service in the United States Army on
the 5th day of August A. D. 1917, and was given an honorable dis-
charge therefrom on the 18th day of June A. D. 1919, and died in-
testate on the 22nd day of April A. D. 1927, at Hines, Illinois;
that at the date of his death the said Robert C. Towery was a resident
of Christian County, in the State of Illinois; that the said Robert
C. Towery left surviving him as his only heirs at law and next of
kin the plaintiff Charles F. Towery, his brother, and Mamie Ball, wife
of Claude Ball, his half-sister; that afterwards, on, to-wit: the 2nd
day of May A. D. 1927, the plaintiff was duly appointed and qualified
as administrator of the estate of said Robert C. Towery, deceased,
and letters of administration as such were issued to him by
4 the County Court of Christian County, Illinois, and the plain-
tiff is still acting as such administrator; that the plaintiff in his
own right was and is the duly designated beneficiary of the war risk
insurance hereinafter mentioned;

2. That while in active service under said enlistment the said
Robert C. Towery made application for two policies of war risk
insurance in his behalf, and said applications were accepted by the
defendant and two policies or certificates of war risk insurance were
issued thereon, as the plaintiff is informed and believes, in the amount
of Five Thousand Dollars each, and thereafter there was deducted
from the monthly pay of the said Robert C. Towery from time to
time the usual premiums, to-wit: a total of Seven Dollars per month,
in full payment of the money due from the said Robert C. Towery

under the terms of the said policies or certificates, by the terms of which policies or certificates the defendant agreed to pay to the said Robert C. Towery the total sum of, to-wit: Fifty-seven Dollars and Fifty Cents per month in the event of total permanent disability incurred during the life of the said insurance contracts, and in the event of his death to his duly designated beneficiary of said insurance a like sum of money per month until there shall have been paid to such beneficiary a total of two hundred forty of such monthly installments, less the number of such installments, if any, paid to the said Robert C. Towery or his administrator, which policies or certificates of insurance are in words and figures as follows, to-wit:

THE UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C.

Certificate No. 390743

Date Insurance Effective Dec. 5, 1917

This certifies that Robert Clifton Towery has applied for insurance in the amount of \$5,000, payable in case of death or total permanent disability in monthly installments of \$28.75.

Subject to the payment of the premiums required, this insurance is granted under the authority of an Act amending "An Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such Act, and any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract.

W. G. McADOO,
Secretary of the Treasury.

WILLIAM C. DELANAY,
Director of the Bureau of War Risk Insurance.

Countersigned at Washington, D. C.

G. K. MOORE,
Registrar. [SEAL.]

Form 711-2-4175

IMPORTANT NOTICE

The insured may change the beneficiary without the consent of such beneficiary. This insurance is not assignable and is not subject to the claims of the creditors of the insured or of the beneficiaries.

Should a claim arise under this certificate you are requested to write direct to the Bureau of War Risk Insurance, Treasury Department, Washington, D. C., in order to secure a prompt settlement. There will be no expenses in connection with proving a claim and collecting the amount due, other than small fees to notaries. It will not be necessary to consult or employ an attorney, claim agent, or other person to secure benefits under this certificate. 2-4175.

THE UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C.

Certificate No. 1437536

Date Insurance Effective Feb. 1, 1918

This certifies that Robert Clifton Towery has applied for insurance in the amount of \$5,000, payable in case of death or total permanent disability in monthly installments of \$28.75.

Subject to the payment of the premiums required, this insurance is granted under the authority of an Act amending "An Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract.

W. G. McADOO,

Secretary of the Treasury.

WILLIAM C. DELANOS,

Director of the Bureau of War Risk Insurance.

Countersigned at Washington, D. C.

A. A. CAMPBELL,

Registrar. [SEAL].

Form 711—2-4175

IMPORTANT NOTICE

The insured may change the beneficiary without the consent of such beneficiary. This insurance is not assignable and is not subject to the claims of the creditors of the insured or of the beneficiaries.

Should a claim arise under this certificate you are requested to write direct to the Bureau of War Risk Insurance, Treasury Department, Washington, D. C., in order to secure a prompt settlement. There will be no expenses in connection with proving a claim and collecting the amount due, other than small fees to notaries. It will not be necessary to consult or employ an attorney, claim agent, or other person to secure benefits under this certificate. 2-4175.

3. That during the life of the said insurance contracts the said Robert C. Towery became totally and permanently disabled as a result of the following diseases, ailments, and injuries, to-wit: Nephritis; tumor; left kidney, malignant; aortic insufficiency; aortic stenosis; heart trouble; cancer; general weakness; and general disability.

4. That by reason of the matters and things aforesaid the said Robert C. Towery became and was totally and permanently disabled, on, to-wit: the 18th day of June A. D. 1919, and became entitled to receive from the defendant under the terms of the said contracts of insurance the total sum of Fifty-seven Dollars and Fifty Cents per month for each month thereafter;

5. That the plaintiff made due proof of such disability and death to the defendant and demanded payment of the aforesaid amounts, and his said claim remained pending in the United States Veterans' Bureau ever since a date less than five years subsequent to the death of the said Robert C. Towery, to-wit: ever since the 11th day of February A. D. 1932, until the 8th day of August A. D. 1935; nevertheless, the said defendant and its agents in that behalf, the Veterans' Administration, the Board of Veterans' Appeals, and the Administrator of Veterans' Affairs, have disagreed with the plaintiff as to his claim for said disability and have wholly failed and refused to pay the said sums of money, or either thereof, or any part thereof.

Wherefore the plaintiff as such Administrator prays judgment against the defendant in the sum of Five Thousand Four Hundred Sixty-two Dollars and Fifty Cents, being the amount so due him as such Administrator at the rate of Fifty-seven Dollars and Fifty Cents per month, from the 18th day of June A. D. 1919, to and includ-

7 ing the 18th day of April A. D. 1927, and the plaintiff in his own right prays judgment against the defendant in the sum of Six Thousand Three Hundred Eighty-two Dollars and Fifty Cents, being the amount so due him at the rate of Fifty-seven Dollars and Fifty Cents per month from the 22nd day of April A. D. 1927, to and including the 22nd day of June A. D. 1936, and for the sum of Fifty-seven Dollars and Fifty Cents per month for each and every month thereafter.

CHARLES F. TOWERY, *Plaintiff,*
In his own right and as Administrator
of the Estate of Robert C. Towery, deceased.

PHILLIP B. LEVITON,

EDWARD H. S. MARTIN,

Attorneys for Plaintiff.

[*Duly sworn to by Charles F. Towery; jurat omitted in printing.*]

8-10

In United States District Court

[Title omitted.]

Affidavit of service

Filed July 27, 1936

STATE OF ILLINOIS,

County of Cook, ss:

Edward H. S. Martin, being first duly sworn, on his oath deposes and says that on the 29th day of June A. D. 1936, he filed with the clerk of the above entitled court the original petition in the above-entitled cause and served a true and correct copy thereof upon the United States District Attorney for the above named District and mailed a true copy thereof by registered mail to the Attorney General of the United States on the 29th day of June A. D. 1936.

EDWARD H. S. MARTIN.

Subscribed and sworn to before me this 29th day of June A. D. 1936.

Notary Public.

Received a copy of the petition in the above-entitled cause this 29th day of June A. D. 1936.

M. L. IGOE, P.,
United States District Attorney.

11-12 In United States District Court

[Title omitted.]

Motion to dismiss

Filed Nov. 5, 1937

Comes now the defendant, the United States of America, by its attorneys of record, Michael L. Igoe, United States Attorney, and William M. Lytle, Attorney, Department of Justice, and moves the court that this law suit be dismissed for the reason that it is barred by the Statute of Limitations as provided for in Section 19 of the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, as amended July 3, 1930.

In support of the above motion to dismiss the defendant alleges and offers to prove:

I. That no claim for insurance benefits was received by the Veterans' Administration prior to February 6, 1932.

Wherefore, the defendant prays that the plaintiff's petition be dismissed, that the plaintiff take nothing by this action, that judgment be entered for the defendant and against the plaintiff with costs, and for such other and further relief as may to the court seem just and proper, the premises considered.

M. L. IGOE,

United States Attorney.

WM. M. LYTLE,

Attorney, Dept. of Justice.

Dated at Chicago, Oct. 11, 1937.

Receipt hereof is acknowledged this 18th day of October 1937.

EDWARD H. S. MARTIN,

*Attorney for the Plaintiff.*13-14 In United States District Court, Northern District of Illinois,
Eastern Division

No. 45443

CHARLES F. TOWERY, ETC. AS ADMINISTRATOR OF THE ESTATE OF ROBERT
C. TOWERY, DECEASED.

vs.

UNITED STATES OF AMERICA

Judgment

December 1, 1937

Present: Honorable J. LEROY ADAIR, District Judge.

This day comes the United States by the United States Attorney and enters herein its motion to dismiss which motion is sustained and

It is ordered that the Plaintiff's petition filed herein be and the same is hereby dismissed at Plaintiff's costs therefore it is considered by the Court that the Defendant do have and recover of and from the Plaintiff Charles F. Towery as Administrator of the Estate of Robert C. Towery deceased its costs and charges in this behalf expended to be paid in due course of administration to which ruling of the Court the Plaintiff by his attorney duly excepts and ninety (90) days time from this date is allowed the plaintiff within which to file his Bill of Exceptions herein.

15 In United States District Court

[Title omitted.]

Petition for appeal

Filed Jan. 24, 1938

To the Honorable WILLIAM H. HOLLY.

Judge of said court:

And now comes Charles F. Towery in his own right and as Administrator of the Estate of Robert C. Towery, deceased, the plaintiff in the above-entitled cause, by Edward H. S. Martin, his attorney, and feeling himself aggrieved by the final judgment of this court entered against him in favor of the United States of America, defendant, on the 1st day of December A. D. 1937, hereby prays that an appeal may be allowed to him therefrom to the United States Circuit Court of Appeals for the Seventh Circuit, and in connection with his petition herewith presents his assignment of errors.

And the said plaintiff further prays that he may be allowed to prosecute his said appeal in forma pauperis, for the reasons set forth in the affidavit herewith submitted.

EDWARD H. S. MARTIN.

Attorney for Plaintiff.

16-17 STATE OF ILLINOIS.

County of Cook, ss:

Charles F. Towery being first duly sworn on his oath says that he is a citizen of the United States of America; that he is the plaintiff in the above entitled cause and the appellant mentioned in the foregoing petition for appeal and in the assignment of errors herewith submitted; that this affiant has a wife dependent upon him for support and has no money or property and his only income consists of wages of only \$60.00 per month and the use of an apartment; that the said Robert C. Towery, deceased, left no property or estate except the claim sued upon in the said cause; that this affiant will be able to spare from his said wages only sufficient money to pay for the printing of his briefs on said appeal, as the said wages are barely sufficient for that and for the support of this affiant and his said wife; that because of his poverty he is unable to pay

costs of such appeal or to give security for the same and that
 verily believes that he is entitled to the redress he seeks by such
 real, for the reasons set forth in the assignment of errors here-
 submitted, and therefore prays that he may be given leave
 prosecute such appeal without the payment of costs or the giving
 security therefor; and further affiant saith not.

CHARLES F. TOWERY.

Subscribed and sworn to before me this 21st day of January A. D.

REAL]

DENNIS F. PARSONS,
Notary Public.

In United States District Court

Title omitted.]

Assignment of errors

Filed Jan. 24, 1938

and now comes the plaintiff-appellant, by Edward H. S. Martin,
 attorney, and in connection with his petition for appeal in the
 cause entitled says that in the record and proceedings and in
 final judgment aforesaid, manifest error has intervened, to the
 prejudice of the plaintiff-appellant, to-wit:

The District Court erred in granting the motion of the defend-
 to dismiss the said suit and dismissing the same.

The final judgment of said District Court in said cause is con-
 trary to law.

Any reason whereof the said plaintiff-appellant prays that the
 judgment aforesaid may be reversed and that the said cause may
 be remanded to the said District Court with directions to deny the
 motion.

EDWARD H. S. MARTIN,
Attorney for Plaintiff-Appellant.

[Omitted.]

In United States District Court

Title omitted.]

Order allowing appeal

Jan. 24, 1938

It is hereby ordered that the plaintiff be, and hereby is, allowed an
 appeal to the United States Circuit Court of Appeals for the Seventh
 Circuit from the final judgment entered on the 1st day of December,

A. D. 1937, in this cause, and that he be, and hereby is, given leave to prosecute such appeal without payment of costs or giving of security therefor.

HOLLY,
District Judge.

21 [Omitted.]

22 In United States District Court

Bill of exceptions

Filed Jan. 21, 1938

Be it remembered that on November 9 A. D. 1937, the above entitled cause came on for hearing in the District Court of the United States for the Northern District of Illinois, Eastern Division, before the Honorable J. LeRoy Adair, District Judge, on the motion of the defendant filed November 5 A. D. 1937, to dismiss the said suit. Mr. Edward H. S. Martin appeared as attorney for the plaintiff, and the Honorable Michael L. Igoe, United States Attorney, by Messrs. William M. Lytle and B. F. Schwartz, Attorneys, Department of Justice, appeared for the defendant. The said motion is in words and figures as follows:

23 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 45443

CHARLES F. TOWERY IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE
ESTATE OF ROBERT C. TOWERY, DECEASED, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

MOTION TO DISMISS

Comes now the defendant, the United States of America, by its attorneys of record, Michael L. Igoe, United States Attorney, and William M. Lytle, Attorney, Department of Justice, and moves the court that this law suit be dismissed for the reason that it is barred by the Statute of Limitations as provided for in Section 19 of the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, as amended July 3, 1930.

In support of the above motion to dismiss the defendant alleges and offers to prove:

I. That no claim for insurance benefits was received by the Veterans' Administration prior to February 6, 1932.

Wherefore, the defendant prays that the plaintiff's petition be dismissed, that the plaintiff take nothing by this action, that judgment be entered for the defendant and against the plaintiff with

costs, and for such other and further relief as may to the court seem just and proper, the premises considered.

MICHAEL L. IGOE,

United States Attorney.

WILLIAM M. LYTLE,

Attorney, Dept. of Justice.

Dated at Chicago Oct. 11, 1937.

Receipt hereof is acknowledged this 18th day of October 1937.

EDWARD H. S. MARTIN,

Attorney for the Plaintiff.

24 No evidence was offered or received at the hearing of said motion, but the said motion was heard on the face of the plaintiff's petition and the said motion, the granting of which motion was duly objected to by the plaintiff, and after arguments of counsel the said motion was taken under advisement by the court and on December 1 A. D. 1937, the court, by its judgment entered of record on that day, granted the said motion and dismissed the plaintiff's petition at the plaintiff's costs: to which action of the court plaintiff then and there duly excepted and was then and there allowed by the court ninety days in which to file his bill of exceptions in said cause: which was all that occurred at the hearing of the said motion.

And inasmuch as the foregoing does not fully appear of record the plaintiff renders this, his bill of exceptions, within the time allowed by law and the extension of time so allowed by the court in said cause, and prays that the same may be certified as such and thereby made a part of the record in said cause: all of which is accordingly done this 21st day of January A. D. 1938.

[SEAL]

J. LEROY ADAIR,

District Judge.

O. K.:

M. L. IGOE.

B. F. SCHWARTZ.

25-26 [File endorsement omitted.]

27 In United States District Court

[Title omitted.]

Stipulation as to transcript of record

Filed Jan. 24, 1938

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in making up the transcript of the record to be submitted to the United States Circuit Court of Appeals for the Seventh Circuit on appeal in said cause, may include in such transcript the following records:

and files in said cause, using originals where permitted by law and copies otherwise, to-wit:

1. Petition filed June 29, 1936.
 2. Affidavit of service filed July 27, 1936.
 3. Motion to dismiss filed November 5, 1937.
 4. All orders and judgment entered December 1, 1937.
 5. Petition for appeal filed January 24, 1938.
 6. Assignment of errors filed January 24, 1938.
 7. Order entered January 24, 1938, allowing appeal.
 8. Bill of exceptions filed January 21, 1938.
 9. Citation filed January 24, 1938.
 10. This stipulation.
- Chicago, January 24, 1938.

EDWARD H. S. MARTIN,

Attorney for Plaintiff-Appellant.

M. L. IGEO,

U. S. Attorney.

Attorney for Defendant-Appellee.

By B. F. SCHWARTZ.

- 28 [Clerk's certificate to foregoing transcript omitted in printing.]
- 29-30 [Citation in usual form showing service on M. L. Igoe, filed Jan. 24, 1938, omitted in printing.]
- 31 [Clerk's certificate to foregoing transcript omitted in printing.]
- 32 [Caption omitted.]
- 33 In United States Circuit Court of Appeals, Seventh Circuit

April 27, 1938

6567

CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR, ETC.,
PLAINTIFF-APPELLANT

vs.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division

Minute entry

Now this day come the parties by their counsel and this cause now comes on to be heard on the transcript of record and briefs of counsel, and on oral argument by Mr. Edward H. S. Martin, counsel for appellant, and by Mr. J. Gregory Bruce, counsel for appellee, and the Court having heard the same, takes this matter under advisement.

In United States Circuit Court of Appeals for the
Seventh Circuit

October Term, 1937. April Session, 1938

No. 6567

CHARLES F. TOWERY IN HIS OWN RIGHT AND AS ADMINISTRATOR OF
THE ESTATE OF ROBERT C. TOWERY, DECEASED, PLAINTIFF-APPELLANT

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal From the District Court of the United States for the Northern
District of Illinois, Eastern Division*Opinion*

Filed June 18, 1938

Before SPARKS, MAJOR, and TREANOR, Circuit Judges.

TREANOR, Circuit Judge. This is an appeal from a judgment of the District Court dismissing the suit at plaintiff's cost. The suit was brought on claims under two war risk insurance policies, the plaintiff seeking to recover as beneficiary under the policies for death benefits and as administrator for total permanent disability benefits.¹

The complaint alleged that insured, the deceased, became totally and permanently disabled on June 18, 1919, during the life of the policy; that the insured thereby became entitled to receive monthly payments in installments of \$57.50 each; and that insured died April 22, 1927. The plaintiff further states in his complaint that under the policy the defendant agreed to pay to the beneficiary on the death of the insured like installments until there should be paid a total of 240 monthly installments, less whatever number of installments, if any, which had been paid to the insured.

The defense of statute of limitations was raised by motion to dismiss and the motion was sustained.

The following statutory provisions were the basis of the District Court's granting a motion to dismiss:² "No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date. * * * Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: * * *"

¹ The two policies were identical and we shall treat them as one policy for purposes of our discussion.

² Title 38 U. S. C. A. Sec. 443 (Section 19 World War Veterans' Act, 1924, as amended July 3, 1930.)

It is the defendant's contention that the "happening of the contingency" upon which the claims in the instant case are founded was the "alleged occurrence of permanent total disability of the insured;" and that the occurrence of the permanent total disability of the insured in 1919 started the statute of limitations running against the plaintiff's claims, both as personal representative of the insured and as beneficiary under the policies.

If the defendant's contention is correct the District Court properly sustained the motion to dismiss, since under the government's theory the statutory period had expired long before suit was brought.

It is clear that the period of limitation begins to run when "the right accrued." The "right" is the right which is asserted in the suit; and by further statutory declaration this right accrues upon "the happening of the contingency upon which the claim was founded." But the right which has accrued is a *right* "for which the claim is made." And by force of the foregoing language, the right which is asserted by the allegations of the complaint in this case is a right to receive payment of insurance benefits for which claims are made, that is, total and permanent disability benefits and death benefits.

At the outset we should note that the contract of insurance covers two rights for each of which a claim may be made, a right which may accrue to the insured for disability benefits; and a right which may accrue to the beneficiary for death benefits. Our question then is, what was the contingency upon which the respective claims for benefits under the insurance policy was founded, since each right in suit accrued upon the happening of that contingency.

37 For the purposes of a suit to enforce a right, for which a claim is made, the contingency upon which the claim is founded must bear such a relation to the claim that, in the case of the non-happening of the contingency, the claim is unenforceable. By the terms of the contract of insurance contained in the policy a claim for death benefits could not be enforced without the happening of the death of the insured. But if no question of lapse of policy by reason of non-payment of premiums is involved in a suit, it is not necessary for a beneficiary to prove that there has been total and permanent disability. When, as in the instant case, the insured had discontinued payment of premiums several years before his death, it would be an essential fact of plaintiff's case that total and permanent disability occurred at a time prior to the discontinuance of the payment of the premiums. Otherwise the beneficiary would fail to show the existence of a valid contractual obligation at the time of the death of the insured. But it is clear that the claim for death benefits is founded on the "happening of the contingency" of total and permanent disability only in the same sense that it is founded on the "happening of the contingency" of the payment of insurance premiums during the life of the insured.

The term "contingency" is not defined by the statute. Consequently, if the contract of insurance does not disclose the "contingency" the

statutory limitation cannot be applied, since courts are not at liberty to devise a "contingency" upon which to found a claim. But there should be no difficulty in determining the "contingency" upon which claim for insurance benefits is founded in view of the definite designation of the two possible contingencies in the language of the contract of insurance.

Under the terms of the insurance policy the government agrees to pay a principal amount, converted into monthly installments, "to the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the insured, while the insurance is in force." It is apparent from the provisions of the contract of insurance that a beneficiary has no enforceable legal claim for the payment of benefit installments until the death of the insured, and it is difficult to preceive how the happening of the contingency of "total and permanent disability" can be the foundation of a claim for money payments when such claim is not legally enforceable until the happening of another contingency, the death of the insured; and when the claim may be enforceable without the happening of the first contingency.

The insurance contract between the government and the insured binds the government to pay a principal amount in installments, the number of installments being limited to 240. By the terms of the policy the government is obligated to pay the insured monthly installments in case of total and permanent disability, the obligation to pay "commencing with such disability as established by the award of the director of the Bureau and continuing during such disability." If the insured should collect the 240 installments, the contractual obligation of the government is at an end. But there is a further contractual obligation running to the beneficiary, the maturing of which is contingent upon the death of the insured. The insurance contract combines the features of both disability and life insurance. The government is no less obligated in respect to the life insurance feature than in respect to the total and permanent disability feature, and no less legally obligated to the persons who become entitled to the life insurance benefits than to the insured if he becomes entitled to the disability benefits. But since by the terms of the policy the government's liability for payment is limited to 240 payments, it may happen in a particular case that the government can discharge its obligation by making monthly payments during the life of the insured. But the government cannot discharge any obligation to the beneficiary under the insurance contract during the lifetime of the insured for the simple reason that no obligation exists in favor of the beneficiary until the death of the insured. Upon the death of the insured the beneficiary, by the terms of the contract, is entitled to receive monthly installments for a period not exceeding 240 months. The conclusion seems inescapable that factually and legally the claim for these monthly installments is founded upon the death of the insured. When that contingency takes place, the legal right to the payment of such installments has accrued.

We conclude that the happening of the contingency on which the claim of the beneficiary is founded is the occurrence of the death of the insured; and, consequently, the right for which the claim is made accrued at the death of the insured.

In respect to the right of the insured to receive monthly installments in case of total and permanent disability the insurance contract provides for payment of monthly installments "to the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, *commencing with such disability as established by the* 39 *award of the director of the Bureau and continuing during such disability.*" [Our italics.] It is clear from the foregoing that if the disability benefit consisted of a determinable amount, unaffected by the termination of disability, the "happening of the contingency on which the claim was founded" would be the inception of the condition of total and permanent disability; and by the terms of the statute the right would accrue and the statute of limitations would begin to run at that time, even if the determinable amount should be payable in monthly installments. But the contract of insurance against permanent and total disability provides for possibility of discontinuance of such disability, as well as its continuance, and limits monthly payments to such time as the disability continues. In other words, by the very terms of the contract of insurance the right to payment of disability benefits which accrues upon the inception of permanent and total disability is in fact a right to the payment of the several installments as each becomes due during the continuance of the disability. Consequently, continuance of disability is an element in the contingency upon which the claim is founded since no installment becomes due and payable except during the continuance of disability. In the case of death a right accrues to the beneficiary to payment of all death benefits which will ever become payable under the terms of the contract. But by the terms of the contract the right of the insured to receive any particular payment of a monthly installment cannot accrue legally until the payable date arrives during continuance of disability, since the government owes no duty to make payment on any other contingency.

It necessarily follows that the statute of limitations cannot start running against the insured, in respect to any particular installment of disability benefits, before the payable date for such installment, since the arrival of the payable date during continuance of disability consummates the contingency upon which the claim is founded.

At the death of the insured on April 22, 1927, any right to payment of disability benefits ceased to exist. On February 11, 1932, the running of the statute of limitations was suspended since on that date the administrator filed his claim for installments for total permanent disability benefits which had become due up to the date of the death of the insured. Consequently, the bar of the statute was not effective as to any installments payable within six years prior to February 11, 1932, and before the death of the insured; therefore the admin-

40 istrator had a valid enforceable claim for all monthly installments of disability benefits which accrued during the period from February 11, 1926, up to and including the date of death of the insured, April 22, 1927.

The government has urged that the view, which we are now adopting, runs counter to the purpose of the statutory limitations. But, as pointed out in our discussion, the statute neither designates nor defines "contingency"; and we must assume that Congress used the term "contingency" with knowledge of the provisions of the yearly renewable term insurance policies and of the rights and duties created thereby. We cannot assume an intention on the part of Congress to cut off claims arbitrarily when it used language which necessarily prolonged the life of the claims, if applied with due regard for the provisions of the contracts of insurance under which the claims arose. That it was not the purpose of Congress to cut off, but to continue protection of, interests of persons entitled to insurance benefits, was indicated by the fact that the statute expressly authorized suits to be brought any time prior to July 3, 1931, regardless of the time of the accrual of a right for which a claim was made. And in view of that provision, the government's position, if accepted, would lead to arbitrary results. For example, in the instant case if the insured had become totally and permanently disabled on June 18, 1919, and had lived beyond July 3, 1931, he could have brought suit any time prior to that date or, even beyond that date, within an extended period of time gained by reason of pendency of claim. But if the insured had lived and had filed his claim on July 4, 1931, any suit subsequently filed by the insured or his administrator, on such claim would have been barred. And if the insured had died prior to July 3, 1931, and his beneficiary had filed a suit on or before that date, the beneficiary could have recovered. But if the beneficiary had filed a claim on July 4, 1931, any suit based upon that claim would have been barred under the government's interpretation of "contingency upon which the claim is founded."

While the six year limitation for filing of a suit necessarily becomes restrictive in its effect upon claims, yet it undoubtedly was intended to relieve against hardships resulting from the fixing of the arbitrary date of July 3, 1931. This is clear from the provision of the act which allows a suit to be brought within six years after the right accrued or within one year after July 3, 1930, *whichever is the later date*. Evidently Congress was not actuated by a desire to cut off any meritorious claims, even though they might be classed as "stale," since the act extended the time for suit on any claim to July 3, 1931, even though the contingency on which the claim was founded might have happened as far back as 1917.

When Congress provided for the change from yearly renewable term insurance to converted insurance the act provided, with certain exceptions, that "all yearly renewable term insurance shall cease on

July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927."¹ By force of the foregoing provision all rights to insurance benefits under yearly renewable term policies were kept alive in case of death or permanent disability prior to July 2, 1927, assuming, of course, that death or permanent and total disability had occurred during the life of the policy. The continuance of the insurance was not conditioned upon the insured's, or on the beneficiary's, having filed a claim prior to July 2, 1927, or within any limited period thereafter.

The foregoing, as well as other legislative declarations, disclose a recognition by Congress that the government was bound by the yearly renewal contracts of insurance to pay a stated amount of insurance benefits in the form of 240 monthly installments, and indicate a clear intention on the part of Congress that this obligation be performed in all meritorious cases; and to give a construction to the phrase, "contingency upon which the claim was founded," which is inconsistent with the terms of the yearly renewal term policies, and which would result in cutting off meritorious claims, would conflict with the liberal purpose which runs throughout all the Congressional acts which relate to the enforcement of claims for insurance benefits under these policies.

We conclude that the District Court was in error in sustaining the government's motion to dismiss. The judgment is reversed with instructions to the District Court to overrule the motion to dismiss and for further proceedings not inconsistent with this opinion.

42 In United States Circuit Court of Appeals, Seventh Circuit

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CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE
ESTATE OF ROBERT C. TOWERY, DECEASED, PLAINTIFF-APPELLANT

vs.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division

Judgment

June 18, 1938

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the Judgment of the said District Court in this cause be, and

¹ 38 U. S. C. A., sec. 512.

the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court with instructions to the said District Court to overrule the Motion to Dismiss, and for further proceedings not inconsistent with the Opinion of this Court.

It is further ordered, in the event that a money judgment is recovered by the Plaintiff against the Defendant in this cause, that Twenty-Five Dollars and Fifteen Cents (\$25.15), costs of plaintiff in this Court, be taxed against said plaintiff; and that said amount be deducted from said Judgment if obtained, and transmitted by the Clerk of the District Court to the Clerk of this Court, who is to account for same, when received, in his report of earnings.

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Recital as to issuance of mandate

And afterwards, to-wit: On the fifteenth day of July 1938 the Mandate of this Court issued to the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division.

44

[Clerk's certificate to foregoing transcript omitted in printing.]


Supreme Court of the United States

Order allowing certiorari

Filed October 24, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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